

Formal Action # 2903

IN THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE

FOR THE TWENTIETH JUDICIAL DISTRICT AT NASHVILLE

STATE OF TENNESSEE

Plaintiff,

v.

ONE CALL COMMUNICATIONS,

INC., doing business as OPTICOM,

foreign corporation and also known

as CENTRAL INDIANA

TELAMARKETING CORPORATION,

Respondent.

ASSURANCE OF VOLUNTARY COMPLIANCE

THIS ASSURANCE OF VOLUNTARY COMPLIANCE ("Assurance") is given by One Call Communications, Inc., doing business as Opticom, also known as Central Indiana Telamarketing Corporation of Carmel, Indiana ("Respondent"), to Charles W. Burson, Attorney General and Reporter for the State of Tennessee ("Attorney General").

WITNESSETH:

Some of the facts and circumstances surrounding the execution of this Assurance are as follows:

A. The Division of Consumer Affairs of the Department of Commerce and Insurance (the "Division") and the Attorney General have conducted an investigation of specific business practices of Respondent. These practices include violating the Tennessee alternative operator service law, Tenn. Code Ann. § 65-5-206 by charging rates for alternative operator service telephone calls initiated from Defendant's pay telephones (also known as "customer owned or coinless operator telephone or "COCOT") or pay telephones using Defendant as the long distance carrier, in excess of those permitted by law, regulation, rule or tariff. Defendant has also added an additional "property imposed fee" of one dollar (\$1.00) to each operated assisted telephone call without clearly and conspicuously disclosing the additional fee to consumers and in violation of Tenn. Code Ann. § 65-5-206. Respondent's business practices are more fully described in the State's Petition. As a result of the investigation, the Division and the Attorney General have determined that certain acts and practices of Respondent have violated the Tennessee Consumer Protection Act of 1977, Tenn. Code Ann. §§ 47-18-101, et seq. (the "Act") and the Tennessee law relating to operator assisted telephone services, Tenn. Code Ann. § 65-5-206 which also constitutes a violation of the Act.

B. Respondent neither admits nor denies any wrongdoing.

C. Respondent desires to give this Assurance, and the Attorney General desires to accept it, in order to avoid the costs and expense of litigation.

NOW, THEREFORE, acting pursuant to Tenn. Code Ann. § 47-18-107, Respondent gives, and the Attorney General accepts, the following assurances:

BUSINESS PRACTICES

Accordingly, it is hereby agreed that upon approval of the court, Respondent shall be permanently enjoined and bound from engaging in the practices set forth herein:

1.1 Respondent shall not engage in any unfair or deceptive acts or practices in the conduct of its business. Respondent shall abide by all provisions of the Tennessee Consumer Protection Act of 1977, Tenn. Code Ann. §§ 47-18-101, et seq., including but not limited to,

§ 47-18-104(a) and (b)(27) which prohibits any and all unfair and/or deceptive acts or practices.

1.2 Respondent shall fully comply with the Tennessee law relating to operator-assisted telephone services, Tenn. Code Ann. § 65-5-206. Without limiting the scope of this provision, before offering operated assisted telephone service to a consumer, Respondent shall (A) identify by name the carrier providing the service; (B) state all costs for providing the service and (C) offer to switch the consumer to any other carrier offering operator assisted services and inform the consumer that the switch will be made without charge.

1.3 Respondent shall fully comply with all Public Service Commission (or any successor agency) rules and regulations. Without limiting the scope of this provision, Respondent shall fully comply with the Tennessee Public Service Commission's Interexchange Reseller Rules and Regulations.

1.4 Respondent shall be prohibited from directly or indirectly charging rates to Tennessee consumers that exceed the maximum rate approved by the Tennessee Public Service Commission.

1.5 Respondent shall fully comply with all Federal Communication Commission rules and regulations. Without limiting the scope of this provision, Respondent shall not charge rates to consumers that exceed rates approved by the Federal Communications Commission.

1.6 Respondent shall be prohibited from directly or indirectly adding, including or placing additional charges, costs or fees to operator assisted telephone call charge, unless (a) Respondent has clearly and conspicuously disclosed any such fees to the consumer prior to providing the service that involves such fees and (b) such fee complies with all federal and state laws, rules, regulations, and tariffs.

1.7 Respondent shall be prohibited from directly or indirectly billing or collecting or attempting to the bill or collect from consumers using Respondent's operator services for any additional charges, costs or fees added, included or placed to operator assisted telephone call, unless (a) Respondent has clearly and conspicuously disclosed any such fees to the consumer prior to providing the service that involves such fees and (b) such fee must complies with all federal, state or regulatory laws, rules, regulations and tariffs.

1.8 Respondent shall not directly or indirectly send, forward, or provide incorrect billing information to BellSouth Telephone, GTE, Intermountain Telephone or any other telephone or long distance company or other billing agent, resulting in the billing party billing, collecting or charging consumers for any amounts that would violate any provision of this Assurance.

1.9 Respondent shall be prohibited from directly or indirectly billing or collecting or attempting to bill or

collect for any charges or services which would violate any provision of this Assurance.

1.10 Respondent shall not directly or indirectly charge, bill or otherwise attempt to collect from consumers any amounts in excess of any limit, cap or maximum set by the Tennessee Public Service Commission (or its successor agency) or the Federal Communications Commission.

1.11 Respondent shall not directly or indirectly misrepresent to consumers that a certain amount is owed in connection with operator assisted calls or any other type of service offered by Respondent, when any or all of the amount is not actually due and owing or the charge otherwise violates regulatory, state or federal laws, regulations, rules or tariffs.

1.12 Respondent shall be prohibited from directly or indirectly depositing or receiving any monies into its accounts which Respondent received or obtained by engaging in any act or practice which violates any term of this Assurance.

1.13 Respondent shall not directly or indirectly violate Tenn. Code Ann. § 47-18-104(b)(5) which prohibits "representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or qualities that they do not have or that a person has a sponsorship approval, status, affiliation or connection that such person does not have."

1.14 Respondent shall not directly or indirectly, cause "likelihood of confusion or of misunderstanding as to the source, sponsorship or certification of goods or services" which would thereby violate Tenn. Code Ann. Tenn. Code Ann. § 47-18-104(b)(2) or cause a "likelihood of confusion or misunderstanding as to affiliation, connection or association with, or certification by another" which would violate Tenn. Code Ann. § 47-18-104(b)(3).

1.15 Respondent shall not engage in any billing and collection activities in violation of the Debt Collection Act of 1982, 5 U.S.C.A. § 5514, et seq.

1.16 Respondent shall not directly or indirectly represent to any consumer that a transaction confers or involves rights, remedies or obligations that it does not have or involve or which are prohibited by law in violation of Tenn. Code Ann. 47-18-104(b)(12).

1.17 Respondent shall fully comply with all Public Service Commission (or any successor agency) tariffs relating to "COCOT" pay phones. Without limiting the scope of this provision, Defendant shall specifically comply with PSC tariff, 1220-4-2, Regulations for Telephone Companies, section 1220-4-2-.43, Authorization to Operate a Public Pay Telephone Service, which states "owner shall charge intrastate toll calls no more than the rates approved by the commission for the local exchange serving the instrument and the dominant interexchange carrier in the state."

1.18 Respondent shall not limit the damages or recovery to which consumers may be entitled under Tennessee law.

1.19 Respondent shall properly time all telephone calls placed using Respondent's telephone service. Without limiting the scope of this section, Respondent shall not begin charging a consumer for a collect telephone call until the collect call is actually accepted by the paying party.

2. JURISDICTION

2.1 Jurisdiction of this Court over the subject matter herein and over the person of the Respondent for the purposes of entering into and enforcing this Assurance and Agreed Order is admitted. Jurisdiction is retained by this Court for the purpose of enabling the State to apply to this Court for such further orders and directions as may be necessary or appropriate for the construction, modification or execution of this Assurance and Agreed Order, including the enforcement of compliance therewith and penalties for violation thereof. Respondent agrees to pay all court costs and attorneys' fees and any costs associated with any petitions to enforce any provision of this Assurance and Agreed Order against Respondent.

3. PUBLIC SERVICE COMMISSION SETTLEMENT

3.1 Respondent understands that its settlement with the Tennessee Public Service Commission is incorporated into this Assurance of Voluntary Compliance as Exhibit A. Respondent agrees to be bound by all of the terms set forth in Exhibit A as a part of this Assurance of Voluntary Compliance.

3.2 As set forth in Exhibit A, in lieu of making restitution to each consumer that paid the \$1.00 property imposed fee ("PIF"), the Respondent shall pay the sum of \$60,000 to the Tennessee Public Service Commission as a fine. The Respondent represents and warrants that it did not earn or benefit in excess of \$60,000 from charging the PIF to consumers. The Respondent understands that the State expressly relies upon this representation and if said representation is false, incomplete, incorrect, inaccurate, or misleading in any way, the State may move to vacate or set aside this Assurance and Agreed Order or request that Respondent be held in contempt.

3.2 Respondent represents and warrants that it did not and has never improperly clocked or calculated the length of telephone calls placed through Respondent's telephone service in any fashion. The Respondent understands that the State expressly relies upon the represented list and if said representation is false, incomplete, incorrect, inaccurate, or misleading in any way, the State may move to vacate or set aside this Assurance and Agreed Order or request that Respondent be held in contempt.

4. PAYMENT OF ATTORNEYS' FEES AND COSTS TO THE STATE

4.1 Respondent shall pay the sum of Four Thousand and 00/100 Dollars (\$4,000.00) to the State of Tennessee for attorneys' fees and costs of investigation, prosecution and monitoring for compliance of this matter, which may be used for consumer protection purposes at the sole discretion of the Attorney General. Said payment shall be made by providing a certified check made payable to the State of Tennessee to the Attorney General or his designated representative on the day of execution of this Assurance.

5. MONITORING AND COMPLIANCE

5.1 Upon request, Respondent agrees to provide books, records and/or documents to the State at any time, and further, to informally, or formally under oath, provide testimony and/or other information to the State relating to compliance with this Assurance. Respondent shall make any requested information available within one (1) week of the request, at the Office of the Attorney General or at such other location within the State of Tennessee as is agreeable to Respondent and the Attorney General. This section shall in no way limit the State's right to obtain documents, information, or testimony pursuant to any federal or state law, regulation, or rule.

6. PRIVATE RIGHT OF ACTION

6.1 Nothing in this Assurance shall be construed to affect any private right of action that a consumer may hold against Respondent.

7. PENALTY FOR FAILURE TO COMPLY

7.1 Respondent understands that upon execution and filing of this Assurance, any subsequent failure to comply with the terms hereof is prima facie evidence of a violation of the Tennessee Consumer Protection Act.

7.2 Respondent understands that any knowing violation of the terms of this Assurance is punishable by civil penalties of not more than One Thousand Dollars (\$1,000.00) for each violation, in addition to any other appropriate penalties and sanctions, including contempt sanctions pursuant to the Tennessee Consumer Protection Act. Respondent agrees to pay all court costs and attorneys' fees associated with any petitions to enforce this Assurance and Order against the Respondent.

8. VENUE

8.1 Pursuant to Tenn. Code Ann. § 47-18-107, venue as to all matters between the parties relating hereto or arising out of this Assurance is solely in the Chancery Court of Davidson County, Tennessee.

9. REPRESENTATIONS AND WARRANTIES

9.1 Respondent represents and warrants that the execution and delivery of this Assurance is its free and voluntary act, that this Assurance is the result of good faith negotiations, and that Respondent believes that the Assurance and terms hereof are fair and reasonable. The parties warrant that they will implement the terms of this Assurance in good faith.

9.2 Respondent represents that signatories to this Assurance have authority to act for and bind the Respondent.

9.3 Respondent will not participate, directly or indirectly, in any activity to form a separate entity for the purpose of engaging in acts set forth and prohibited in this Assurance or for any other purpose which would otherwise circumvent any part of this Assurance.

9.4 Neither Respondent nor anyone acting on its behalf shall directly or indirectly state, imply, or cause to be stated or implied that the Attorney General, the Division, or any other governmental unit of the State of Tennessee has approved, sanctioned, or authorized any practice, act, or conduct of the Respondent.

9.5 Acceptance of this Assurance by the State shall not be deemed approval by the State of any of Respondent's advertising or other business practices.

9.6 Within thirty (30) days of the entry of this Assurance, Respondent shall submit a copy of this Assurance to each of its officers, directors, employees and any third parties who act directly or indirectly on behalf of the Respondent whether as an agent, independent contractor or other, involved in conducting business in the State of Tennessee.

9.7 Respondent warrants and represents that it is the proper party to this Assurance and Order. Respondent further acknowledges that the State expressly relies upon this representation and warranty, and that if it is false, misleading or inaccurate, the State may move to vacate or set aside this Assurance and Agreed Order, or may request that the Respondent be held in contempt.

9.8 One Call Communications, Inc., doing business as Opticom, also known as Central Indiana Telamarketing Corporation represents that it is the true legal name of the entity entering into this Assurance of Voluntary Compliance and Agreed Order. The Respondent understands that the State expressly relies upon this representation and if said representations are false or misleading the State may move to vacate or set aside this Assurance and Agreed Order or request that Respondent be held in contempt.

9.9 This Assurance and Agreed Order may only be enforced by the parties hereto.

9.10 The titles and headers to each section of this Assurance are for convenience purposes only and are not intended by the parties to lend meaning to the actual provisions of the Assurance.

9.11 This Assurance and Agreed Order constitutes the complete agreement of the parties with regard to the resolution of the matters set forth in the State's Petition. This Assurance is limited to resolving only matters set forth in the State's Petition and nothing in this Assurance shall be construed to limit the authority of the Attorney General to protect the interests of the State or the people of the State of Tennessee. Without limiting the scope of this section, this Assurance and Agreed Order does not resolve any related matters pending before the Public Service Commission.

9.12 This Assurance shall be binding and effective against Respondent upon Respondent's signing the

Assurance.

10. COMPLIANCE WITH OTHER LAWS

10.1 Nothing in this Assurance and Order shall be construed as relieving Respondent from the obligation to comply with any other state or federal law, regulation or rule, nor shall any of the provisions of this Assurance and Order be deemed to be permission to engage in any acts or practices prohibited by such law, regulation, or rule. Further, nothing in this Assurance and Order shall be construed as relieving Respondent from the obligation to comply with any Public Service Commission (or any successor agency) tariff, regulation or rule.

11. FILING OF ASSURANCE

11.1 Upon the execution of this Assurance, the Attorney General shall prepare and file in the Chancery Court for Davidson County a Petition, Agreed Order and this Assurance for the Court's approval. Respondent hereby waives any and all rights which he may have to be heard in connection with judicial proceedings upon said Petition. Respondent agrees to pay all costs of filing such Petition, Assurance and Agreed Order. Simultaneously with the execution of this Assurance, Respondent shall execute an Agreed Order in the form annexed hereto. The Assurance, annexed to the Agreed Order, is made a part of and is incorporated into the Agreed Order.

12. APPLICABILITY OF ASSURANCE TO RESPONDENT

AND ITS SUCCESSORS

12.1 Respondent agrees that the duties, responsibilities, burdens and obligations undertaken in connection with this Assurance shall apply to it, to each of its officers, directors, managers, agents, assigns, representatives, employees, partners, subsidiaries, affiliates, parents, related entities, joint venturers, persons or other entities it controls, manages or operates, its successors and assigns, and to other persons or entities acting directly or indirectly on its or their behalf.

13. COSTS

13.1 All costs associated with the filing and distribution of this Assurance and any other incidental costs or expenses incurred thereby shall be borne by Respondent. No costs shall be taxed against the State as provided by Tenn. Code Ann. § 47-18-116.

14. NOTIFICATION TO STATE

14.1 For five (5) years following execution of this Assurance, Respondent shall notify the Attorney General, c/o Consumer Protection Division, 500 Charlotte Avenue, Nashville, Tennessee 37243-0491 and the Public Service Commission (or its successor agency), c/o Consumer Services Division, 460 James

Robertson Parkway, Nashville, Tennessee 37243, in writing at least thirty (30) days prior to the effective date of any proposed changes in its corporate structure, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation or firm, the creation or dissolution or subsidiaries, or any other changes in Respondent's status that may effect compliance with obligations arising out of this Assurance.

ENTERED THIS DAY OF , 1996.

Chancellor

APPROVED FOR ENTRY:

STATE OF TENNESSEE

CHARLES W. BURSON

ATTORNEY GENERAL AND REPORTER

BPR #7775

VINCENT WILLIAMS

CONSUMER ADVOCATE

BPR # _____

CYNTHIA E. CARTER

DEPUTY ATTORNEY GENERAL

BPR #13533

STEPHEN C. KNIGHT
ASSISTANT ATTORNEY GENERAL

BPR # 15514

Tennessee Attorney General's Office

Consumer Protection Division

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Nashville, Tennessee 37243-0491

(615) 741- 3533

Approved by:

MARK WILLIAMS

DIRECTOR

DIVISION OF CONSUMER AFFAIRS

OF THE DEPARTMENT OF

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FOR RESPONDENT:

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LARRY DUNIGAN

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